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**Submission to the Joint Standing Committee on Treaties Inquiry into
Australia's accession to the WTO Government Procurement Agreement (GPA)**

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Introduction

The Australian Fair Trade and Investment Network (AFTINET) is a national network of 60 organisations and many more individuals supporting fair regulation of trade, consistent with human rights, labour rights and environmental sustainability. AFTINET welcomes this opportunity to make a submission to the Joint Standing Committee on Treaties on the WTO Government Procurement Agreement (GPA).

AFTINET supports the development of trading relationships with all countries and recognises the need for regulation of trade through the negotiation of international rules. AFTINET supports the principle of multilateral trade negotiations, provided these are conducted within a transparent, accountable framework that safeguards the interests of all countries and is based on principles of human rights, labour rights and environmental sustainability.

AFTINET supports the following principles for trade negotiations:

- Trade negotiations should be undertaken through open, democratic and transparent parliamentary processes that allow effective public consultation to take place about whether negotiations should proceed and the content of negotiations.
- There should be regular public consultation during negotiations, including publication of proposals and draft texts.
- Before an agreement is signed, the text should be published for public and parliamentary debate to test if it is in the national interest. Comprehensive studies of the likely economic, social and environmental impacts of the agreement should be undertaken and made public for debate and consultation before signing.
- Parliament should vote on the whole agreement, not only the implementing legislation.
- Trade agreements should not undermine human rights, labour rights and environmental protection, based on United Nations and International Labour Organisation instruments.
- Trade agreements should not undermine the ability of governments to regulate in the public interest, and to have national policies which encourage industry development and local employment, including procurement policies.

Summary of Recommendations

- 1) The DFAT National Interest Analysis (NIA) does not include any independent assessment of the costs and benefits of Australia's accession to the GPA. This means that there is no evidence that the claimed benefits will be delivered.**

In the absence of such evidence, the decision to accede to the GPA should not proceed.

- 2) If the Committee recommends that accession should proceed, the Committee should note in its report that the EU has indicated in its conditions of accession that it will seek removal of exemptions for SMEs, through the GPA review process.**
 - a) The Committee should recommend that future governments retain and strongly defend the exemptions for SMEs, and all other exemptions, including**

exemptions for Aboriginal and Torres Strait islander businesses, in Australia's conditions of accession.

- b) The Committee should also recommend that governments retain and strongly defend exemptions for SMEs, and Aboriginal and Torres Strait Islander businesses and other exemptions in the EU-Australia FTA negotiations**
- 3) The Commonwealth government should undertake a training program for procurement officers to ensure that they are aware of and can implement the full range of SME and other procurement exemptions in the WTO GPA and Australia's other trade agreements, and that they are aware of broader definitions of value-for-money and economic benefit.**

The WTO Government Procurement Agreement (GPA)

The GPA is a voluntary plurilateral agreement and includes only a minority of WTO members. Only 47 of 164 WTO members have acceded to the GPA, of which 28 are members of the European Union, which joined as a bloc (DFAT, 2018: 1, para 3).

The GPA is based on the principle that there should be national treatment and non-discrimination for international companies seeking government procurement contracts, which means that international suppliers must be treated as if they were domestic suppliers. Government procurement chapters in Australia's bilateral agreements with various countries are based on the same principle. However, all procurement agreements, including the GPA, have exemptions which are listed by governments for specific industries or types of suppliers.

The existence of these exemptions, and the reluctance of the vast majority of governments to join the GPA show that most governments wish to retain the policy flexibility to allow some local preference for government procurement to encourage both competitive procurement and local industry development and employment.

The Australian WTO GPA accession process

The Australian WTO GPA accession process did not conform to the principles outlined above about transparency and democracy. Instead it followed the current process of calling for public submissions at the beginning of the process in 2014 (to which AFTINET made a submission) followed by four years of secret negotiations, with very little public information provided.

The government announced that the negotiations were complete in June 2018, and the WTO Committee on Government Procurement (GPA Committee) endorsed the terms agreed between Australia and the other parties to the GPA on 17 October, 2018 (WTO GPA Committee, 2018a).

However, the text of the terms of Australia's accession remained secret until it was tabled in Parliament more than a month later on November 30, 2018, and the current inquiry was announced.

Australia's accession to the WTO GPA binds both Commonwealth and State governments.

The only legislative action by Parliament to implement the GPA, and the only opportunity for parliamentary debate, was the passage of the Government Procurement (Judicial review) Bill 2017, which was also required to implement the TPP-11. The government had previously attempted to pass this Bill in 2017, before the completion of the GPA and TPP-11 negotiations, and well before any opportunity for review by this Committee. This attempt was not supported by the majority in the Senate and did not proceed.

This Committee inquiry is supposed to be an opportunity to review whether such legislation should be passed. However, because the Bill also applied to the TPP-11, the Bill was passed by the Parliament on October 17, 2018, over a month before the terms of Australia's GPA accession were made public and this inquiry was even announced.

So in terms of the legislation, this inquiry is too late, as the legislation required to implement the agreement has already been passed. This fact exposes the deep flaws in the current trade agreement process and makes a mockery of effective parliamentary scrutiny by JSCOT.

However, AFTINET believes that it is still important for the Committee to be aware of the details of the terms of accession and possible concerns which could arise in future from the terms of Australia's accession to the GPA.

The importance to Australia of exemptions for small and medium-sized enterprises (SMEs)

There is much evidence to suggest that the main beneficiaries of open government procurement markets are large global companies which have the capacity and economies of scale to monitor overseas procurement markets and tender for large government contracts. This means it is not a level playing field for most Australian companies. In fact, many governments, including Australia's, have recognised this and have developed policies intended to ensure that local small and medium-sized enterprises (SMEs) are considered and given preference in tendering processes.

Past Australian policies allowed greater preferential measures for Australian companies. The signing of a number of bilateral agreements with procurement chapters limited the scope for preferences to be applied to Australian companies. However, these agreements give government scope to retain preferential arrangements for SMEs, for Aboriginal and Torres Strait Islander businesses and in a number of other areas (DFAT, 2004).

Such preferences have been fully exploited by other governments. The US has a Small Business Set-aside Program and the South Korean government has a quality certification and preference program for products of small Korean firms (Thurbon, 2016).

After the Global Financial Crisis, the US Federal Government also enacted specific additional 'Buy American' legislation for federal government spending programs which give preference in procurement to local suppliers, with a specific aim of creating local employment. This was done through the *US Recovery and Reinvestment Act (2009)*, section 1605, which applies to all US states.

Studies have shown that the Australian government previously developed more active procurement policies, but they have been progressively reduced in recent decades (Thurbon, 2016, Australia Institute, 2016:10). This means that Australian procurement practice has not taken full advantage of exemptions for SMEs.

Thurbon has argued that government procurement policy can be a powerful instrument for promoting transformative social and economic goals, from environmental protection and clean energy transition to enhancing the innovative and export capacity of local firms. She argues that Australian governments should not simply seek increased market access for Australian firms but should explore how domestic procurement policy can be used to enhance the techno-industrial and export competitiveness of Australian firms so they might actually take advantage of the market access wins negotiated in trade agreements (Thurbon, 2017:1.)

A Senate Inquiry on this issue was held in 2014, which noted that Australian procurement practice was not fully utilising exemptions for SMEs which were available in trade agreements at that time (Senate Finance and Public Administration References Committee, 2014).

During the course of the GPA negotiations there was a public debate about the crisis in the Australian steel industry and the need for government procurement to be able to assist local industry development, especially through support for small and medium-sized enterprises.

Several state governments subsequently developed policies for using Australian-made steel in government procurement, often using the SME exemption in trade agreements.

Public concern culminated in the 2017 Joint Select Committee Inquiry into Government Procurement, which included equal numbers of parliamentarians from government and non-government parties. The Committee heard evidence from industry and union representatives that Australian government policy has not fully utilised the capacity to give preference to local companies, and that Australian government departments are not aware of, and do not implement this policy. The unanimous report recommended that “in negotiating World Trade Organisation or other trade agreements, the Australian government should not enter into any commitments that undermine its ability to support Australian businesses” (Joint Select Committee, 2017: iv, Recommendation 8).

The Select Committee report also made a large number of other recommendations which supported greater use of government procurement policy to support industry development, including a broader and more explicit definition of economic benefit and value for money in the revised Commonwealth Procurement Rules, education of government procurement officers, and a further parliamentary inquiry to evaluate the impact of the revised rules.

In summary, Australia’s current international trade commitments do permit broader interpretations of value-for-money and preferences for local SMEs which could support local industry development. However, Commonwealth Procurement Rules have until now lacked clarity about how these can be implemented and there appears to be a lack of awareness about them amongst those who implement tendering processes. This puts Australian businesses, especially SMEs looking to grow their capacities, at a disadvantage in competing for government procurement contracts in Australia.

Australian companies are also disadvantaged in competing for overseas procurement contracts, since Australia’s free trade agreement partners like the US, Japan and South Korea have taken full advantage of interpretations which enable them to preference local SMEs, making it difficult for Australian companies to win contracts.

We note that the DFAT National Interest Analysis (NIA) does not include any independent assessment of the costs and benefits of Australia’s accession to the GPA. This means that there is no evidence that the claimed benefits will be delivered.

EU threats to Australia’s SME exceptions in the GPA

The DFAT National Interest Analysis (NIA) claims that SMEs continue to be exempted under Australia’s terms of accession to the GPA (DFAT, 2018:4, paragraph 18).

However, the NIA does not mention that, as part of the terms of Australia’s accession, the EU and some other parties have objected to Australia’s SME exemption as discriminatory and have demonstrated their objection through a clause which says that

“The provisions of Article XVIII shall not apply to suppliers and service providers of Japan and Korea US and Australia in contesting the award of contracts to a supplier or service provider of parties other than those mentioned which are small or medium sized enterprises under the relevant provisions of EU law, until such time as the EU accepts that they no longer operate discriminatory measures in favour of certain domestic small and minority businesses.”

(WTO GPA Committee, October 2018a: 20, clause 2.2).

Article XVIII refers to access to the national judicial appeals mechanism available to all companies bidding for procurement contracts if they can argue that they have not been treated according to the rules of the agreement.

This means that Australian SMEs will have access to the European procurement market, but will not have access to the appeals mechanism. The EU reference to “discriminatory measures in favour of certain domestic small and minority businesses” indicates a clear intention of the EU to pursue the removal of exemptions for SMEs, and for Aboriginal and Torres Strait Islander businesses.

Iceland and Switzerland, which are not EU members but are parties to the GPA, have similar clauses as part of their terms of Australia’s accession.

The WTO Committee on Government Procurement has an ongoing work programme to review exemptions for SMEs through which the EU can pursue this issue (WTO GPA Committee 2018b).

The EU is a very powerful player comprising 28 of the 47 countries that are parties to the WTO GPA. The Committee should be aware that Australia is likely to face future pressure from the EU to reduce or remove its exemptions for SMEs in the WTO GPA.

Australia is also negotiating a bilateral free trade agreement with the EU. Pressure may also be exerted in EU FTA negotiations. If future Australian Commonwealth and State governments wish to retain these exemptions, they will have to be prepared to defend them vigorously in the FTA negotiations. The Committee should note these dangers in its report and should recommend that future governments retain and defend the policy preference to SMEs in all negotiations.

Recommendations

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